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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

POUDRE VALLEY RURAL ELECTRIC ASSOCIATION, INC.,
a Colorado corporation,

Appellant,

v.

THE CITY OF GREELEY, COLORADO,
a municipal corporation,
and HOME LIGHT AND POWER COMPANY,
a Colorado corporation,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

JURISDICTIONAL STATEMENT

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39 pp

QUESTIONS PRESENTED

1. Whether the Colorado Supreme Court's Judgment deprived Poudre Valley Rural Electric Association, Inc. ("Poudre") of its due process right under the Fourteenth Amendment of the United States Constitution to an adjudication by the District Court of the defenses (including Federal Constitutional issues) it had raised to the Complaints in this action?

2. Whether City of Greeley ("Greeley") Ordinance No. 26, 1982 (hereinafter "Ordinance No. 26, 1982") and Article XVIII of the Greeley Charter violate the Supremacy Clause of the United States Constitution, Art. VI, Cl. 2, because they stand as obstacles to the accomplishment of the purpose of the Rural Electrification Act?

3. Whether Greeley's 1981 Annexation Ordinances, Ordinance No. 26, 1982 and Article XVIII of the Greeley Charter impair (a) Poudre's contract with the State of Colorado created when Poudre accepted the offer in § 38-5-101, C.R.S. by constructing facilities on the highways of the State of Colorado to prepare to serve geographic areas in what became the Greeley target annexation area and (b) Poudre's contract with Home Light and Power Company ("Home Light"), defining the boundaries of the territory which each would be certificated by the Colorado Public Utilities Commission to serve on an exclusive basis, in violation of Article I, § 10 of the United States Constitution?

4. Whether Ordinance No. 26, 1982 and Article XVIII of the Greeley Charter deprive Poudre of the franchise it had obtained from the State of Colorado without due process of law in violation of the Fourteenth Amendment of the United States Constitution?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 28.1, Poudre states that it has no parent companies, subsidiaries or affiliates. Poudre is a Colorado cooperative electric association incorporated under the laws of the State of Colorado with approximately 17,000 member/customers in Boulder, Larimer and Weld Counties. Poudre in turn is a member of Tri-State Generation and Transmission Association, Inc., a generation and transmission cooperative.

On May 18, 1987, counsel for Home Light and Public Service Company of Colorado advised the Clerk of the Colorado Supreme Court by letter that Home Light "was, effective November 1, 1986, merged into Public Service Company of Colorado" and that "Public Service has . . . succeeded to Home Light and Power as the party in interest in this proceeding."

Since this proceeding draws into question the constitutionality of statutes of the State of Colorado and neither the State of Colorado nor any agent, officer or employee of this State is a party (unless the State is a party by virtue of the fact that Greeley, a home rule city of the State of Colorado, is the Plaintiff in this action), it is noted that 28 U.S.C. § 2403(b) may be applicable, and the Attorney General of the State of Colorado has been served with a copy of this Jurisdictional Statement.

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OPINIONS BELOW

The Opinion of the Colorado Supreme Court, dated September 8, 1987, is reported at 744 P.2d 739 (Colo. 1987), and is reprinted as Appendix A. The Findings of Fact, Conclusions of Law and Judgment of the District Court in and for the County of Weld and State of Colorado, dated July 18, 1985, as amended on August 2, 1985, were not published[1], but are reprinted as Appendix B.

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[1] Greeley and Home Light filed their appeal from the District Court's judgment directly in the Colorado Supreme Court pursuant to § 13-4-102(1)(b), C.R.S., and therefore there is no Colorado Court of Appeals decision in this case.

JURISDICTION

Greeley and Home Light sought declaratory and injunctive relief prohibiting Poudre from providing, in areas annexed to Greeley, the electrical service it was authorized to provide by a Certificate of Public Convenience and Necessity issued to Poudre by the Colorado Public Utilities Commission (the "PUC"), on the basis that Greeley Ordinance No. 26, 1982 (A105)[2] prohibited the maintenance and installation of Poudre's electrical facilities within the Greeley city limits unless Poudre had a franchise from Greeley (Vol. 1, p. 2; Vol. 1, p. 299).[3]

Five weeks before the commencement of the trial, the City was permitted to amend its Complaint to limit the requested relief to "ordering Poudre Valley Rural Electric Association, Inc., to install no new facilities on rights-of-way controlled by the City of Greeley after the date of this Court's Order and Declaration" and granting declaratory relief to the same effect (Vol. 2, p. 679).

Poudre, in its Answers to the Complaints in this action, raised defenses which called into question the validity of Greeley's 1981 Annexation Ordinances, Greeley Ordinance No. 26, 1982 and Article XVIII of the Greeley Charter on the

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[2] Citations to the separately paginated appendices to this Jurisdictional Statement are in the form "A ____." Because the appended items are voluminous, the appendices are separately presented as permitted by Supreme Court Rule 15.1.

[3] Record references are to the volume and page number of the record before the Colorado Supreme Court, *e.g.*, Vol.__, p.__. Pursuant to Supreme Court Rule 13.1, the record has not been certified at this time because Poudre believes that the factual matters set forth herein are undisputed, and therefore does not believe that the record is "essential to a proper understanding of the case by this Court."

grounds that they were repugnant to the Constitution and laws of the United States. (A56-58 contains the record references showing that Poudre raised these issues below. The Statement of the Case at page 12 of this Jurisdictional Statement contains additional record references to the stages in the proceedings below at which the questions sought to be reviewed were raised.)

The September 8, 1987 *en banc* Opinion of the Colorado Supreme Court (A1) (sometimes referred to herein as the "September 8, 1987 Poudre Opinion") reversed the District Court's judgment that Poudre did not need a franchise from Greeley because it had a franchise from the State of Colorado and held (a) that "REA [Poudre] must obtain a city franchise if it desires to use city streets or public places in order to expand and provide new service within that portion of its certificated service area that was annexed by the City [of Greeley]" (A3), and (b) that the District Court "erred in denying the declaratory and injunctive relief requested in the City's amended complaint." (A18).

On September 22, 1987, Poudre timely[4] filed its Petition for Rehearing with the Colorado Supreme Court.

In Poudre's Brief on Appeal to the Colorado Supreme Court[5] and in its Petition for Rehearing (A48; A49), Poudre

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[4] Rule 40(a) of the Colorado Rules of Appellate Procedure permitted the filing of a Petition for Rehearing within fourteen days of the September 8, 1987 Opinion.

[5] "[B]ecause of its ruling in Poudre Valley's favor, the District Court did not rule on any of the other issues raised by Poudre Valley as defenses other than the conspiracy defense. Accordingly, if the Court should agree with Appellants, Poudre Valley respectfully submits it would not be appropriate to enter the declaratory relief requested by the Appellants because of the need for judicial attention to the issues . . . which have not yet been resolved by the

pointed out the need for at least remand to the District Court for an adjudication of unresolved defenses, including defenses raising Federal Constitutional issues.

Because of the District Court's ruling, Poudre's defenses listed at A56-58, including those raising matters of Federal Constitutional law, were not reached by the District Court under the well-settled principle "that a court will not rule on a constitutional question that is not essential to disposition of the case before it." *Mountain's Shadow Inn, Inc. v. Colorado Dept. of Labor*, 672 P.2d 522, 525 (Colo. 1983).

In its Petition for Rehearing Poudre also pointed out to the Colorado Supreme Court that resolving these defenses against Poudre would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution (A51; ¶12 at A58).

On October 5, 1987, the Colorado Supreme Court, *en banc*, denied Poudre's Petition for Rehearing (A43), making final its September 8, 1987 judgment.

By virtue of its September 8, 1987 Opinion and the denial of Poudre's Petition for Rehearing, the Colorado Supreme Court, the highest court of the State of Colorado in which a decision could be had, has conclusively upheld the validity of Greeley's 1981 Annexation Ordinances, Greeley Ordinance No. 26, 1982 and Article XVIII of the Greeley Charter (notwithstanding Poudre's Federal Constitutional defenses), as well as its own action which, in effect, resolved Poudre's defenses against Poudre without due process of law. *See New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67, 49 S.Ct. 61,

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District Court." Pages 29-30 of Poudre's April 16, 1986 Brief on Appeal before the Colorado Supreme Court.

The District Court reached the conspiracy defense because the conspiracy contentions were also the subject of Poudre's counterclaim against Home Light.

63, 73 L.Ed. 184, 187 (1928) ("[I]t is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough.") and *Chambers v. Mississippi*, 410 U.S. 284, 290 n.3, 93 S.Ct. 1038, 1943 n.3, 35 L.Ed.2d 297, 305 n.3 (1973) ("On the record in this case, despite the State Supreme Court's failure to address the constitutional issue, it is clear that Chambers' asserted denial of due process is properly before us.").

Poudre's timely[6] Notice of Appeal was filed on December 30, 1987 in the Colorado Supreme Court (A45). Because the record has been returned to the District Court, a copy of the Notice of Appeal was also filed with the District Court, in accordance with Supreme Court Rule 10.3, on December 30, 1987.

It is well settled that municipal ordinances and city charter provisions are "statutes" as that term is used in 28 U.S.C. § 1257(2). *See King Mfg. Co. v. Augusta*, 277 U.S. 100, 103-05, 48 S.Ct. 489, 490-91, 72 L.Ed. 801, 805-06 (1928). This Court therefore has jurisdiction of this appeal under 28 U.S.C. § 1257(2).

While the issue raised by the Colorado Supreme Court's ruling against Poudre on its defenses without due process of law may properly be raised only by a petition for a writ of certiorari, if it were the only issue as to which Poudre sought review (see 28 U.S.C. § 1257(3)), it can be joined with issues that are appealable under 28 U.S.C. § 1257(2), and therefore is properly before this Court by virtue of the timely filing of

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[6] *See* 28 U.S.C. § 2101(c) and Supreme Court Rule 11.3 which permit the filing of the Notice of Appeal within 90 days of the Colorado Supreme Court's October 5, 1987 Order Denying the Petitions for Rehearing.

Poudre's Notice of Appeal and Jurisdictional Statement. *Flournoy v. Wiener*, 321 U.S. 253, 263, 64 S.Ct. 548, 553, 88 L.Ed. 708, 715 (1944); *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 547, 42 S.Ct. 516, 523, 66 L.Ed. 1044, 1055 (1922).

Moreover, to the extent this Jurisdictional Statement is treated as a petition for a writ of certiorari, in whole or in part, either pursuant to the foregoing authorities or pursuant to 28 U.S.C. § 2103, it is timely. *See 28 U.S.C. § 2101(c)* and Supreme Court Rule 20.4.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

Article I, Section 10 of the United States Constitution provides in relevant part that:

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .

Article VI, Clause 2 of the United States Constitution provides in relevant part that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Fifth Amendment to the United States Constitution provides in relevant part that:

> [N]or shall private property be taken for public use, without just compensation.[7]

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . .

Colorado Appellate Rule 40(a) is reprinted as Appendix N.

Title 7, Sections 901 and 907 of the United States Code are reprinted as Appendix O.

Title 28, Section 1257 of the United States Code is reprinted as Appendix P.

Title 28, Section 2101 of the United States Code is reprinted as Appendix Q.

Title 28, Section 2103 of the United States Code is reprinted as Appendix R.

Title 28, Section 2403(b) of the United States Code is reprinted as Appendix S.

Rule 201 of the Colorado Rules of Evidence is reprinted as Appendix T.

Section 2-5-113 of the Colorado Revised Statutes is reprinted as Appendix U.

Section 31-2-217 of the Colorado Revised Statutes is reprinted as Appendix V.

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[7] This restriction is applied to the States through the Fourteenth Amendment. *See Chicago, Burlington and Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

Section 38-5-101 and Section 38-5-108 of the Colorado Revised Statutes are reprinted as Appendix W.

Section 40-5-101, Section 40-5-102 and Section 40-5-103 of the Colorado Revised Statutes are reprinted as Appendix X.

Section 40-6-115 of the Colorado Revised Statutes is reprinted as Appendix Y.

Greeley Ordinance No. 26, 1982 is reprinted as Appendix BB.

Article XVIII of the City of Greeley Charter is reprinted as Appendix DD.

The relevant parts of Article XX, Section 4 and Section 6 of the Colorado Constitution are reprinted as Appendix EE.

Article XXV of the Colorado Constitution is reprinted as Appendix FF.

STATEMENT OF THE CASE

At issue in this case is the authority of a State to ignore controlling decisions of this Court which not only prohibit Greeley from enacting Ordinance No. 26, 1982, but which also give Poudre a right to its "day in court" with respect to its unresolved defenses, including defenses raising Federal Constitutional issues (A56-58).

At all times relevant hereto Home Light and Poudre were electric utilities providing electric service in Colorado pursuant to Certificates of Public Convenience and Necessity issued by the PUC and the franchise granted by § 38-5-101, C.R.S. ("§ 38-5-101").

In 1970, to resolve longstanding disputes as to which entity could serve in parts of Weld County, Colorado, Home Light and Poudre entered into an agreement defining the bounda-

ries of the territory which each would be certificated to serve on an exclusive basis. The PUC approved this agreement and made it the order of the PUC in Decision No. 74654 dated April 3, 1970 (Exhibit 1).[8] Pursuant to this agreement and the PUC order approving the agreement, territory to the southwest of the 1970 city limits of Greeley was certificated to Poudre (Exhibits 1 and 11). At the time of the grant of territory to Poudre by the PUC and at the time of Poudre's acceptance of the offer in § 38-5-101 (by constructing facilities on the highways of the State of Colorado), no part of Poudre's territory was within the City of Greeley.

This case arises out of Greeley's 1981 ordinances (Exhibits Q, S, U and W), annexing a portion of Poudre's certificated territory. As the District Court noted in making its oral rulings:

> [T]he town is coming to the utility. The utility was there first, and the town is coming there.

Vol. 10, p. 161, lines 7 through 10.

Poudre prepared to serve the area southwest of Greeley because it was in its certificated territory and it had the duty to be ready to serve the needs of any population growth in that territory. At the time of the annexation, Poudre had expended $196,000 to prepare to serve the area, which included the territory actually annexed as well as other territory further southwest of Greeley contemplated for annexation (Vol. 9, p. 23, line 19 through p. 24, line 15). In addition, the aggregate of Poudre installations within the territory that Greeley's development plan had targeted for

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[8] All references to Exhibits herein are to Trial Exhibits. All Trial Exhibits were admitted by stipulation (Vol. 5, p. 47, lines 15-22).

annexation had a replacement cost, at the time of the initial annexation in 1981, of $1.3 million (Vol. 8, p. 147, lines 6-24).

In July of 1981, Home Light filed Application No. 34,000 (A29, Exhibit 4) with the PUC seeking to have Poudre expelled from serving the portion of its certificated territory recently annexed to Greeley on the basis of Home Light's franchise agreement with Greeley.

The PUC rejected Home Light's request to serve the area in question in its March 30, 1982 decision (A34), holding that to take this territory from Poudre and give it to Home Light would take Poudre's property without due process of law since Poudre was ready, willing and able to serve the area (A37). The PUC also determined that Home Light voluntarily surrendered its right to serve the area in question by virtue of its agreement with Poudre and was bound by its 1970 Agreement that Poudre would serve this territory on an exclusive basis (A38).

Home Light did not seek judicial review of the PUC Order in Application No. 34,000 and that decision is therefore binding on Home Light. *See* § 40-6-115, C.R.S. (A98).

On May 18, 1982, six weeks after the decision of the PUC in Application No. 34,000, Greeley adopted Ordinance No. 26, 1982, prohibiting electric utilities from maintaining or installing electrical transmission equipment on any street, alley, sidewalk or other public place without a franchise from the City (A105). Ordinance No. 26, 1982 provided that it was effective five (5) days after its final publication, or on May 26, 1982 (A108 and A110-11).

Over Poudre's objection, at an election held on July 13, 1982, in which Poudre did not participate[9], Greeley submitted to its "qualified electors" a proposed franchise purporting to give Poudre the right to operate throughout Greeley, even though Poudre sought to serve only in its certificated territory which was a small portion of the City involving only five services[10] (Vol. 6, p. 130, line 11 through p. 131, line 14; Exhibits 63 and 65).

Following an extensive campaign by Home Light, based in part on Home Light's suggestion that the question was whether Home Light or Poudre would serve the entire City of Greeley (*see* Exhibits 68 to 75), the proposal to grant Poudre a city franchise for the entire City was defeated by a vote of 1,050 to 419 (*see* Exhibit Y).

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[9] The last sentence of note 5 of the September 8, 1987 Poudre Opinion (A19) correctly stated that "REA objected to and declined to participate in the special franchise election." The September 8, 1987 Poudre Opinion also incorrectly stated that "REA sought consent from the qualified electorate and its request was overwhelmingly rejected in the franchise election." (A16). Not only did Poudre not seek an election, but Greeley, contrary to its Ordinance No. 26, 1982 (A105), conducted the election without Poudre's request or tender of the election cost deposit required by Section 18-3 of Greeley's Charter (A114). The first "whereas" clause of Ordinance No. 26, 1982 states that "Article XVIII of the Charter of the City of Greeley establishes a procedure for granting franchises . . . ." *(see* A105)

[10] Even though the 1981 annexations involved only five services, the evidence projected 20,148 residential units and total net revenues of $15,884,408 through the year 2010 in the portion of Poudre's territory targeted to be annexed to Greeley (Vol. 9, p. 25, line 17 through p. 33, line 14). *See also* Exhibit 68 and the testimony of Home Light's President Mr. Geile commencing at Vol. 8, p. 84.

On September 24, 1982, two months after the July 13, 1982 election, Greeley served its Complaint[11] seeking declaratory and injunctive relief prohibiting Poudre from providing electrical service in areas annexed to Greeley, on the basis that Greeley Ordinance No. 26, 1982 prohibited the maintenance and installation of Poudre's electrical facilities in Greeley without Poudre's obtaining a franchise from Greeley.

Home Light was permitted to intervene as a plaintiff in June of 1983.

The City's Amended Complaint focused on Poudre's activities subsequent to May 18, 1982, the date of adoption of Ordinance No. 26, 1982, and sought a permanent injunction "ordering Poudre . . . to install no new facilities in rights-of-ways controlled by the City of Greeley after the date of this Court's Order and Declaration." (Vol. 2, p. 679):

> 25. That Ordinance No. 26, 1982, of the City of Greeley, Colorado, passed on May 18, 1982, prohibits the installation or maintenance of any wires, cables, or equipment on, under, or above any street, alley, sidewalk, or public place in the City of Greeley without obtaining a franchise pursuant to Article XVIII of the Greeley City Charter.

Vol. 2, p. 681 (emphasis added).

Poudre, in its Answers to the Complaints, raised defenses which called into question the validity of Greeley's 1981 Annexation Ordinances, Greeley Ordinance No. 26, 1982 and Article XVIII of the Greeley Charter on the grounds that they were repugnant to the Constitution and laws of the

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[11] Greeley did not exercise the option to purchase Poudre's facilities which Ordinance No. 26, 1982 purported to give Greeley (Vol. 3, p. 856).

United States. (*See* Unresolved defenses quoted with Record References at A56-58.)

Poudre raised each of these defenses again in its Trial Data Certificate, (Vol. 2, pp. 442-54), filed pursuant to Section 1-18 of Colo.R.Civ.P. 121, and Greeley acknowledged in its Trial Data Certificate that Poudre had raised these defenses (Vol. 2, pp. 654-55). These defenses were then incorporated by reference into the Pretrial Order (Vol. 3, p. 856).

Both Poudre and Greeley filed motions for summary judgment based on the question of whether Greeley had the power under Colorado law to require Poudre to obtain a city franchise. In its Brief opposing Poudre's Motion and in support of its Motion, Greeley conceded that it was not entitled to the relief requested until the District Court had considered all of Poudre's defenses (Vol. 3, pp. 722-23).

At the beginning of the trial, the District Court explained the issue of fact which it believed needed to be resolved:

> It seems to me that the key case in the matter was this Englewood case, and I concur with the defendant that I'm not free, as certain counsel have suggested, to just rule that the Supreme Court went off the deep end on that one, and ignore it.
>
> • • •
>
> In any event, it appears to me that the only conclusion that you can come to on that is that there are issues of fact concerning the nature of the activity that have to be determined. Since that seems to be crucial, it appeared to me I couldn't grant any summary judgment on either side . . . .

Vol. 5, p. 2, line 14 through p. 4, line 3.

Commencing on May 22, 1984, a six-day trial was conducted to the Court, in which Poudre presented extensive evidence on its territory, history of service, and service plan, as well as its cost to be ready to serve, and the presence of its facilities and lines both within Greeley and the Greeley target annexation area.

After hearing the evidence, the District Court concluded that Poudre had a franchise from the State pursuant to § 38-5-101, and that Greeley therefore lacked power to require Poudre to obtain a city franchise. As discussed, *supra*, the District Court based its decision on *City of Englewood v. Mountain States Telephone & Telegraph Co.*, 163 Colo. 400, 431 P.2d 40 (1967).

The September 8, 1987 *en banc* Opinion of the Colorado Supreme Court (A3) reversed the judgment of the District Court that Poudre did not need a franchise from Greeley because it had a franchise from the State of Colorado and held (a) that "REA [Poudre] must obtain a city franchise if it desires to use city streets or public places in order to expand and provide new service within that portion of its certificated service area that was annexed by the City [of Greeley]" (A3), and (b) that the District Court "erred in denying the declaratory and injunctive relief requested in the City's amended complaint." (A18).

As stated *supra*[12] in the Jurisdiction Portion of this Jurisdictional Statement, Poudre pointed out to the Colorado Supreme Court the need for remand to the District Court to resolve unresolved defenses, including defenses raising Federal Constitutional issues.

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[12] *See* Note 5, *supra*.

Greeley did not argue that these issues had not been raised below, but rather made the conclusory and unsupported statement that "the record before this Court is wholly inadequate to support the burden Poudre Valley carries on those defenses. A return to the trial court for such a ruling would be futile. This Court should grant the complete relief requested by the City of Greeley." (*See* Greeley's Reply Brief before the Colorado Supreme Court at page 12, as to which Poudre had no right of reply.)

As discussed *infra*, Greeley's representation to the Colorado Supreme Court quoted above is not accurate. Not only was there substantial evidence to support Poudre's defenses, but that evidence was undisputed.

Poudre's Petition for Rehearing and the ruling on that petition are discussed, *supra*, in the Jurisdiction Section of this Jurisdictional Statement.

During the pendency of this Appeal, Poudre continues to provide electrical service in that portion of Greeley certificated to it by the PUC under an "Agreement for Provision of Utility Service" dated July 19, 1983 (A76) pursuant to which Ordinance No. 26, 1982 will not be enforced as to Poudre "during the course of" this litigation and Poudre "shall continue" to serve and extend service within the City of Greeley "until final judgment and exhaustion of appeals." The Agreement by its terms is not a "waiver of any claim or defense of either Poudre Valley or the City of Greeley" in this litigation (A77).

THE QUESTIONS ARE SUBSTANTIAL[13]

Poudre respectfully submits that the Judgment of the Colorado Supreme Court warrants plenary review. As shown below, the Colorado Supreme Court not only ignored controlling decisions of this Court protecting Poudre's right as a matter of federal due process to its "day in court" on its defenses, but also, in effect, ruled against Poudre on these defenses, notwithstanding controlling decisions of this Court which required a ruling in Poudre's favor.

A. THE COLORADO SUPREME COURT'S JUDGMENT DEPRIVED POUDRE OF ITS DUE PROCESS RIGHT UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION TO AN ADJUDICATION BY THE DISTRICT COURT OF THE DEFENSES (INCLUDING FEDERAL CONSTITUTIONAL ISSUES) IT HAD RAISED TO THE COMPLAINTS IN THIS ACTION.

The effect of the September 8, 1987 Poudre Opinion requiring Poudre to "obtain a city franchise if it desires to use city streets or public places in order to expand and provide new service within that portion of its certificated service area that was annexed by the City [of Greeley]," and the October 5, 1987 Order denying Poudre's Petition for Rehearing, was to rule against Poudre on the defenses discussed below, as well as the other defenses reprinted at A56-58, even though these defenses were not before the Colorado Su-

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[13] Also included in this Section are Poudre's arguments, in accordance with Supreme Court Rule 21, in support of its contention that a writ of certiorari should be granted with respect to the issue raised by the Colorado Supreme Court's ruling against Poudre on its defenses without due process of law. *See* authority cited in "Jurisdiction" section of this Jurisdictional Statement for joining this issue with those issues raised in Poudre's Appeal.

preme Court because the District Court had no need to and therefore did not decide them.

Poudre is entitled, as a matter of due process, to an adjudication by the District Court of these defenses. *See American Surety Co. v. Baldwin*, 287 U.S. 156, 168, 53 S.Ct. 98, 102, 77 L.Ed. 231, 239 (1932) ("Due process requires that there be an opportunity to present every available defense . . . .") and *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 282, 52 S.Ct. 556, 558, 76 L.Ed. 1102, 1106-07 (1932) ("[T]he Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked.").

In *Saunders v. Shaw*, 244 U.S. 317, 37 S.Ct. 638, 61 L.Ed. 1163 (1917), this Court recognized that it is a denial of due process not to permit a party to present evidence in support of his case after reversal by a state supreme court of a judgment in his favor. *See also Winbourne v. Eastern Air Lines*, 632 F.2d 219 (2d Cir. 1980) (District Court's grant of summary judgment, without reaching issues of fact raised by defendants' affirmative defenses, was denial of due process); *Thompson v. Madison County Board of Education*, 476 F.2d 676, 678 (5th Cir. 1973) (Due process requires opportunity to "present evidence and argument on the contested facts and legal issues framed by the answer to the complaint.").

The Colorado Supreme Court's Judgment has denied Poudre its "day in court" on these fundamental issues and Poudre respectfully submits that this case should be remanded to the District Court in and for the County of Weld for an adjudication of these issues.

B. GREELEY ORDINANCE NO. 26, 1982 AND ARTICLE XVIII OF THE GREELEY CHARTER VIOLATE THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION, ARTICLE VI, CLAUSE 2, BECAUSE THEY STAND AS OBSTACLES TO THE ACCOMPLISHMENT OF THE PURPOSE OF THE RURAL ELECTRIFICATION ACT.

Under the Supremacy Clause, U.S. Const., Article VI, Cl. 2[14], the enforcement of a state law is preempted by federal law when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Jones v. Rath Packing Co.*, 430 U.S. 519, 526, 97 S.Ct. 1305, 1310, 51 L.Ed.2d 604, 614 (1977).

It is undisputed that all of Poudre's assets, including those in areas annexed by Greeley, have been mortgaged[15] to the Rural Electrification Administration (the "REA"), an agency of the United States Department of Agriculture, as security for loans made pursuant to the Rural Electrification Act, 7 U.S.C. § 901 *et seq.*

In connection with its conclusion that Poudre's activities were a matter of statewide and national concern (and not local concern), the District Court found that granting the relief requested by Greeley "would prevent adequate service to rural territory in the vicinity of expanding cities" (emphasis added), but did not reach the Supremacy Clause defense as a matter of law:

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[14] Poudre raised the defense that granting the relief requested by Greeley would violate the Supremacy Clause of the United States Constitution in its Answers and in its Petition for Rehearing. (¶ 11 at A58; A50-51).

[15] *See* Exhibit 88 and the testimony of Poudre's General Manager, Ronald J. Carey, at Vol. 8, p. 113, line 18 through p. 114, line 17.

> 35. To allow the expulsion of a [SIC] electric utility from portions of its certificated territory by virtue of annexation of that territory by a municipality which franchises another utility would create serious problems. It would handicap the certificated electric utility in providing suitable service to its territory because long term planning would be difficult or impossible. Large scale investment in plant and equipment could not be jusitified [SIC] if the utility were subject to expulsion at the whim of adjoining cities. These and other similar considerations would prevent adequate service to rural territory in the vicinity of expanding cities.

¶ 35 at Vol. 3 at p. 1029 (emphasis added); A26.

The validity of this finding was not challenged on appeal by Greeley or Home Light.

Thus, Ordinance No. 26, 1982 and Article XVIII of the Greeley Charter violate the Supremacy Clause of the United States Constitution because they stand as obstacles to the accomplishment of the objectives of the Rural Electrification Act. *See Public Util. Dist. No. 1 of Pend Oreille Co. v. United States*, 417 F.2d 200, 201 (9th Cir. 1969) (Condemnation of an REA-financed utility violated the Supremacy Clause because "if, as a result of the condemnation, the loans to Inland were paid in full, but the remaining portions of the system could not continue to operate with decent service and at decent rates, the Government would have been paid but the purpose of the Rural Electrification Act [of providing low cost energy to rural areas] would have been frustrated."). *See also Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 389, 103 S.Ct. 1905, 1915, 76 L.Ed.2d 1, 13 (1983) ("[A] particular rate set by the Arkansas PSC may so seriously compromise important federal interests, including the ability of the AECC to repay its loans, as to be

implicitly pre-empted by the Rural Electrification Act," citing *Jones v. Rath Packing Co., supra).*

C. GREELEY'S 1981 ANNEXATION ORDINANCES, GREELEY ORDINANCE NO. 26, 1982 AND ARTICLE XVIII OF THE GREELEY CHARTER IMPAIR (A) POUDRE'S CONTRACT WITH THE STATE OF COLORADO AND (B) POUDRE'S CONTRACT WITH HOME LIGHT, IN VIOLATION OF ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION.

This Court has recently noted that the Contract Clause[16] "is not a dead letter," *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 241, 98 S.Ct. 2716, 2721, 57 L.Ed.2d 727, 734 (1978), and that "impairments of a State's own contracts would face more stringent examination under the Contract Clause than would laws regulating contractual relations between private parties." 438 U.S. at 244 n.15, 98 S.Ct. at 2722 n.15, 57 L.Ed.2d at 736 n.15.

"When this Court is asked to invalidate a state statute upon the ground that it impairs the obligation of a contract, the existence of the contract and the nature and extent of its obligation become federal questions for the purposes of determining whether they are within the scope and meaning of the Federal Constitution, and for such purposes finality cannot be accorded to the views of a state court." *Irving Trust Co. v. Day,* 314 U.S. 556, 561, 62 S.Ct. 398, 401, 86 L.Ed. 452, 457 (1941).

This Court's opinion in *Irving Trust, supra,* makes it clear that the Colorado Supreme Court's rulings on matters of

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[16] Poudre raised the Impairment of Contract defense in its Answers and in its Petition for Rehearing (¶¶ 5 and 6 at A57 and A50).

Colorado State law must yield to the provisions of the Federal Constitution, including the Contract Clause.

In *Russell v. Sebastian*, 233 U.S. 195, 34 S.Ct. 517, 58 L.Ed. 912 (1914), this Court held that a contract was created between the state and the utility when the utility accepted the offer by the state contained in a constitutional provision similar to § 38-5-101, by constructing facilities to prepare to serve a geographic area:

> [T]he provision plainly contemplated the establishment of a plant devoted to the described public service and an assumption of the duty to perform that service. That the grant, resulting from an acceptance of the State's offer, constituted a contract, and vested in the accepting individual or corporation a property right, protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this court.

233 U.S. at 204, 34 S.Ct. at 520, 58 L.Ed. at 921.

Russell v. Sebastian also held that the contract between the utility and the state created by the utility's installing lines and preparing to serve a geographic area, permitted the utility not only to continue to maintain its existing facilities, but to expand them:

> [W]e find no ground for the conclusion that each act of laying pipe was to constitute an acceptance *pro tanto*. We think that the offer was intended to be accepted in its entirety as made, and that acceptance lay in conduct committing the person accepting to the described service . . . . In this view, the grant embraced the right to lay the extensions that were needed in furnishing the supply within the city.

233 U.S. at 208, 34 S.Ct. at 521, 58 L.Ed. at 923 (citations omitted) (emphasis added).

Russell v. Sebastian reversed the California Supreme Court's refusal to grant a writ of habeas corpus to a person arrested on the charge of excavating in a city street in violation of a municipal ordinance, and recognized, not only that it was not bound by the California Court's determination that the utility had no vested rights which permitted it to expand its facilities without a city franchise, but that the issue of what rights had been acquired prior to the allegedly impairing legislation was a "question which, in view of the appeal to the clause of the Federal Constitution prohibiting state legislation impairing the obligation of contracts, it is the duty of this court to determine for itself." 233 U.S. at 202, 34 S.Ct. at 519, 58 L.Ed. at 920.

In rejecting the California Supreme Court's construction of its constitutional provision that the contract between the state and the city did not entitle the utility to extend its facilities, this Court held in *Russell v. Sebastian* that the only possible construction was that the contract between the state and the utility permitted the utility to expand its facilities:

> This construction of the constitutional provision is the only one that is compatible with the existence of the duty which it was intended, as it seems to us, that the recipient of the state's grant should assume. The service, as has been said, was a community service. Incident to the undertaking in response to the state's offer was the obligation to provide facilities that were reasonably adequate . . . . But this duty and the right to serve, embracing the right under the granted privilege to install the means of service, were correlative.

233 U.S. at 208-09, 34 S.Ct. at 521-22, 58 L.Ed. at 923 (citations omitted) (emphasis added).

See also Detroit United Railway v. Michigan, 242 U.S. 238, 37 S.Ct. 87, 61 L.Ed. 268 (1916) (Township and village

franchises were subsisting and valid contracts which could not be impaired by the subsequent act of the Michigan legislature extending a city's limits.); *Traverse City v. Consumers Power Co.*, 340 Mich. 85, 64 N.W.2d 894 (1954) (reversing, based on *Russell v. Sebastian*, a lower court judgment which precluded Consumers Power from extending its lines within a city without a city franchise covering the expansion area); *City of Beverly Hills v. City of Los Angeles*, 175 Cal. 311, 165 P. 924 (1917) (affirming, based on *Russell v. Sebastian*, a lower court judgment that the City of Beverly Hills lacked authority to require the City of Los Angeles to obtain a city franchise where it had a state franchise granted by the County of Los Angeles prior to the incorporation of the City of Beverly Hills.).

If the District Court had reached the Impairment Defense, the evidence was uncontroverted that long before Greeley commenced annexing Poudre's territory in 1981, and long before Greeley Ordinance No. 26, 1982 became effective on May 26, 1982, Poudre had constructed 2,400 miles of lines, including lines running through Greeley.[17] Construction of Poudre's system in Weld County from 1940 through 1981 began pursuant to a 1940 permit from Weld County (*see* A101 and Exhibits 103, 125 and 126), 18 years before Greeley acquired the powers of a home rule city in July of 1958[18], 41

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[17] *See, e.g.*, Vol. 6, p. 156, lines 10-12 and lines 18-25; Vol. 8, p. 112, line 23 through p. 113, line 5; Vol. 8, p. 147, line 6 through p. 151, line 9; Vol. 10, p. 38, line 6 through p. 41, line 14.

[18] Under Article XX, Section 6 of the Colorado Constitution, Greeley acquired the powers of a home rule city when it filed its home charter with the Colorado Secretary of State in July of 1958 (A120 and A113).

However, § 31-2-217, C.R.S., reprinted at A92, provides that the adoption of a home rule charter cannot affect vested rights.

years before Greeley adopted its 1981 Annexation Ordinances (Exhibits Q, S, U and W), and 42 years before Greeley enacted franchise Ordinance No. 26, 1982 (A105).

Applying these undisputed facts to the applicable Colorado law, it is clear that Greeley's 1981 Annexation Ordinances, Greeley Ordinance No. 26, 1982 and Article XVIII of the Greeley Charter impaired Poudre's contracts.

In *City of Englewood*, the City sought, among other things, a declaratory judgment that Mountain States Telephone had no right to occupy or use the City's streets for its poles, lines and wires without obtaining a city franchise. The dispute arose because on expiration of a twenty-year franchise by the City, Mountain States Telephone declined to seek a new franchise. Mountain States Telephone contended it had a right to continue to occupy the City's public streets and alleys without a new city franchise by virtue of § 50-5-1, C.R.S. 1963, now § 38-5-101. (Sections 38-5-101 and 38-5-108, reprinted at A93, are in all material respects identical to Sections 2451 and 2458 of Chapter 45 of the 1908 Colorado Revised Statutes and were first passed by the Colorado Legislature in 1907.)

In *City of Englewood*, the Colorado Supreme Court held that Mountain States Telephone had a franchise from the State by virtue of § 50-5-1 [now § 38-5-101, reprinted as Appendix W at A93] and that the provisions of Article XX of the Colorado Constitution (which granted power to home rule cities) had no application because its language only applied in cases where the individual or corporation did not have a franchise from the State.

> Here defendant has a franchise from the state by virtue of C.R.S. 1963, 50-5-1 [now § 38-5-101]. Such a holding, as in *McPhee*, does no violence to the constitutional provisions permitting home rule cities to grant

> franchises, for those provisions are applicable to situations such as were presented in *Baker, supra*, where the individual or corporation does not have some type of a state franchise. Thus Article XX has no application here.

163 Colo. at 406-7, 431 P.2d at 43 (emphasis added).

In *City of Englewood*, the Colorado Supreme Court also held that the franchise from the State granted by § 50-5-1 [now § 38-5-101] permitted Mountain States "not only to maintain its facilities in plaintiff's public ways, but also . . . to construct and operate additional ones therein without obtaining a city franchise."

163 Colo. at 405, 431 P.2d at 42 (emphasis added).

City of Englewood also held that, where the entity seeking permission has a franchise from the State, the home rule city expresses its consent under § 50-5-8 [now § 38-5-108] through its reasonable exercise of its police power:

> We point out that C.R.S. 1963, 50-5-8 [now § 38-5-108] is perfectly consistent with defendant's position that the city may require, under its police power, reasonable acts on the part of anyone using its streets. For example, it can require the securing of a permit or license, with attending fee requirements, prior to the erection of a new pole in a certain place or the extension of a wire along a particular street or the reasonable regulation of objects which may be placed in its streets and alleys.

163 Colo. at 407, 431 P.2d at 43-44 (emphasis added).[19]

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[19] The City's Complaints in this action (like the amended complaint in the *City of Englewood* case) did not allege that Poudre is unwilling to obtain whatever permits are required by the City or to pay the charges or assessments the City might impose. That is because Poudre's willingness to do so is undisputed. *See, e.g.*,

In *City of Englewood*, the Colorado Supreme Court held that in enacting § 50-5-1, C.R.S. 1963 [now § 38-5-101], the Colorado Legislature acted "well within the boundaries of Article XXV"[20] of the Colorado Constitution and that the term "public highways" as used in § 50-5-1 [now § 38-5-101] was not limited to those highways located outside the boundaries of home rule cities but included the streets within such cities as well. 163 Colo. at 405, 431 P.2d at 42.

Thus, under the Colorado Supreme Court's decision in *City of Englewood*, Poudre did not need to obtain a franchise from Greeley because it "has a franchise from the state by virtue of C.R.S. 1963, § 50-5-1" [now § 38-5-101] and the City is "powerless to require a further franchise." 163 Colo. at 406, 431 P.2d at 43.

Exhibit 57 and the District Court's Finding No. 15 (paragraph 15 at page 2 of the District Court's Findings of Fact, Conclusions of Law and Judgment A23, Vol. 3 at p. 1027).

Moreover, because the issue was not in the case, the District Court did not reach the issue of Greeley's consent pursuant to its exercise of the police powers (paragraph 6 at page 5 of the District Court's Findings of Fact, Conclusions of Law and Judgment, A27, Vol. 3 at p. 1030).

[20] In *Denver v. Public Utilities Commission*, 181 Colo. 38, 43-44, 507 P.2d 871, 873 (1973), the Colorado Supreme Court held that Article XXV (which was added to the State Constitution in 1954) took away from cities the power to regulate privately owned public utilities within home rule cities:

[T]he purpose of the change [the addition of Article XXV of the Colorado Constitution] was to grant to the General Assembly the authority to regulate privately owned public utilities *within* home rule cities. Without the grant of such power the regulation of service among the inhabitants of the city was a local matter, and the laws of the state in conflict with ordinances and charter provisions enacted pursuant to Article XX had no force and effect within the municipality. (Emphasis added and in the original.)

In support of its argument that Poudre could be precluded from expanding its facilities, Greeley[21] urged that *City of Englewood, supra,* was not properly decided (see e.g., page 10, n.2 of Greeley's Reply Brief before the Colorado Supreme Court) and conceded "that the Court in *Englewood* construed the foregoing statutory provisions [§§ 38-5-101 and 108] as a grant of a franchise from the State . . . ." Page 19 of Greeley's Opening Brief before the Colorado Supreme Court.

It is therefore clear that the City of Greeley, the Colorado Municipal League, Poudre, the District Court and the Colorado Supreme Court in the *City of Englewood* case all understood that § 38-5-101 granted Poudre a State franchise, subject only to the reasonable exercise of the police power under § 38-5-108.

Moreover, subsequent to the Colorado Supreme Court's decision in *City of Englewood*, § 50-5-1 and 50-5-8 (which were the citations to the 1963 Colorado Revised Statutes) were reenacted in the 1973 Colorado Revised Statutes as § 38-5-101 and § 38-5-108 (*see* § 2-5-113, C.R.S.). Accordingly, under Colorado law the Colorado Legislature has approved the judicial construction of § 38-5-101 and 108 contained in *City of Englewood*. *See Moorehead v. John Deere Inc. Equipment Co.*, 194 Colo. 398, 401, 572 P.2d 1207, 1209 (Colo. 1978) ("Where statutes are reenacted, the judicial construction placed upon them is deemed to have been approved by the General Assembly, with the understanding that the former construction will be adhered to.").

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[21] The Colorado Municipal League also conceded that for Greeley to prevail, *City of Englewood* had to be reversed. *See* page 30 of its Opening Brief before the Colorado Supreme Court and page 3 of its Reply Brief before the Colorado Supreme Court.

The September 8, 1987 Poudre Opinion states that it distinguishes this case from *City of Englewood* on the basis that the telephone company once had a city franchise, even though it was refusing to renew it after its expiration. The *City of Englewood* decision cannot be distinguished on that basis because the reason in *City of Englewood* for permitting the telephone company not only to maintain but to expand its existing facilities was § 38-5-101 and not (as stated in the September 8, 1987 Poudre Opinion, at A15-16, that the telephone company once had a franchise from the City which had expired at the time of the *City of Englewood* case. *City of Englewood* held that the telephone company,

> regardless of the validity of its original city franchise (a point we need not decide), acquired what in law is a valid state franchise or right by virtue of C.R.S. 1963, 50-5-1 and 8. [Now § 38-5-101 and § 38-5-108]. This permitted it not only to maintain its facilities in plaintiff's public ways, but also the right to construct and operate additional ones therein without obtaining a city franchise. (Emphasis added.) 163 Colo. at 405, 431 P.2d at 42.

Under the authorities cited, *supra*, this Court has a duty to decide for itself the federal questions of whether there was a contract between Poudre and the State of Colorado and the extent of Colorado's obligation to Poudre under that contract. Deciding those issues necessarily includes an examination of the validity of the distinction made by the Colorado Supreme Court in its September 8, 1987 Poudre Opinion.

Poudre respectfully submits that, not only does Poudre have a right to expand its facilities as a matter of Federal Constitutional law under the authorities cited, *supra*, but the Colorado Supreme Court's ruling that Poudre can maintain its facilities on Greeley's streets to serve existing but not new

customers (A3; A18), does not track with the language of Ordinance No. 26, 1982 which on its face prohibits Poudre from maintaining its facilities to serve existing customers without obtaining a city franchise.

The lack of a rational basis for the distinction drawn by the Colorado Supreme Court in its September 8, 1987 Poudre Opinion is also evidenced by the Petition for Rehearing filed by the Amicus in support of Greeley's position in the Colorado Supreme Court (A59; §§ 7, 8 at A62).

Moreover, as set forth, *supra*, at pages 22 and 23, it is undisputed that Poudre, like the telephone company *in City of Englewood* had all required consents (including a permit from Weld County, A101 and Exhibit 103) before it began construction, commencing in 1940, in the geographic area which was annexed to Greeley in 1981 and is in the Greeley target annexation area.

Accordingly, under *City of Englewood*, Poudre was entitled to expand its facilities because "there is nothing in C.R.S. 1963, § 50-5-8 which requires the consent of a municipality for the maintenance or operation of telephone facilities once they have been previously, and we assume, lawfully installed." 163 Colo. at 407, 431 P.2d at 44.

Because it is undisputed that Poudre accepted the offer from the State of Colorado found in § 38-5-101 in 1940 (prior to the enactment of the 1981 Annexation Ordinances, prior to the enactment of Ordinance No. 26, 1982 and prior to Greeley's acquisition of the power of a home rule city in July of 1958), Poudre is entitled under *Russell v. Sebastian*, *supra*, to expand its facilities as a matter of Federal Constitutional law.

Accordingly, Greeley's 1981 Annexation Ordinances, Ordinance No. 26, 1982 and Article XVIII of the Greeley Charter (which were given effect by the September 8, 1987 Poudre

Opinion) impaired not only Poudre's contract with the State (created no later than 1940 when it commenced construction of its facilities on the highways of the State of Colorado), but also Poudre's 1970 contract with Home Light, defining the boundaries which each would be certificated by the PUC to serve on an exclusive basis, and which the PUC found in Application No. 34,000 was binding on Home Light and constituted a voluntary surrender of Home Light's right to serve in the area in question (A38).

D. GREELEY ORDINANCE NO. 26, 1982 AND ARTICLE XVIII OF THE GREELEY CHARTER DEPRIVE POUDRE OF THE FRANCHISE IT HAD OBTAINED FROM THE STATE OF COLORADO WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

It is well settled that a franchise granted by "the state in consideration of the performance of a public service . . . constitutes a property right within the protection of the Fourteenth Amendment." *Frost v. Corporation Commission*, 278 U.S. 515, 520, 49 S.Ct. 235, 237, 73 L.Ed. 483, 487 (1929). Colorado has also recognized that a utility's right to serve within its certificated area constitutes a property right which cannot be taken except by due process of law. *Western Colorado Power Co. v. Public Utilities Commission*, 163 Colo. 61, 69, 428 P.2d 922, 926-27 (1967).

Clearly, Ordinance No. 26, 1982 and Article XVIII of the Greeley Charter deprive Poudre of its franchise from the State of Colorado without due process of law, because under *Frost, supra*, Poudre is entitled to operate its business within its PUC-certificated territory including any portion of that territory within Greeley's city limits.

CONCLUSION

By refusing to permit Poudre to have its "day in court" on its defenses raising Federal Constitutional issues and by resolving these defenses against Poudre, the Colorado Supreme Court has ignored controlling decisions of this Court, depriving Poudre of its property right in its franchise from the State of Colorado without due process of law, frustrating the purposes of the Rural Electrification Act and impairing Poudre's contract with the State of Colorado and its contract with Home Light. Moreover, the refusal of the Colorado Supreme Court to permit Poudre to have its "day in court" on its defenses deprived Poudre of its due process right to an adjudication of these defenses.

For these reasons, the Court should note probable jurisdiction. Moreover, in view of the conflict of the decision below with past decisions of this Court, Poudre respectfully requests the Court to consider either summary reversal of the judgment of the Colorado Supreme Court or to order the Colorado Supreme Court to remand this case to the District Court in and for the County of Weld so that it can make findings of fact and conclusions of law with respect to Poudre's unresolved defenses (A56-58).

Respectfully submitted,

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